No. 82-1959

In the Supreme Court of the United States

October Term, 1982

ARNOLD INDUSTRIES, INC. and
GEORGE BLACKSTONE,
Petitioners,

vs.

ARTHUR STICKLER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Must a notice of appeal be timely filed after a Rule 54(b), Fed. R. Civ. P., certification is entered subsequent to the filing of a premature notice of appeal.

TABLE OF CONTENTS

Question Presented for Review I
Table of Authorities IV
Statement of the Case 1
Summary of Argument 2
Argument 3

A. Petitioners' failure to file a new or amended notice of appeal after the judgment became final justified dismissal of their appeal 3
B. Whether the district court had jurisdiction to enter a Rule 54(b) certification after the filing of a premature notice of appeal is not an issue at this time 5
C. Petitioners' arguments under Rules 58 and 79 Fed. R. Civ. P., Rule 4(a)(2) Fed. R. App. P., the Bankruptcy Act and the "exceptional circumstances" doctrine are on the merits but, in any event, are not well taken 6

Conclusion 9

Appendix:

Letter, June 4, 1982, Clerk of the United States Court of Appeals for the Tenth Circuit to Counsel A1
Letter, February 4, 1983, Clerk of the United States Court of Appeals for the Tenth Circuit to Counsel A3

TABLE OF AUTHORITIES

Cases

A. O. Smith Corp. v. Sims Consolidated Ltd., 647 F.2d 118 (10th Cir., 1981) 3, 4, 7, 8
Bankers Trust Company v. Mallis, 435 U.S. 381 (1978) 7
Griggs v. Provident Consumer Discount Co., 680 F.2d 927 (3rd Cir., 1982), ... U.S. ....., 74 L. Ed. 2d 225 (1982) 5
Local P-171 v. Thompson Farms Co., 642 F.2d 1065 (7th Cir., 1981) 4
NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) 5, 9
Richerson v. Jones, 551 F.2d 918 (3rd Cir., 1977) 5
Sutter v. Groen, 687 F.2d 197 (7th Cir., 1982) 4
Tilden Financial Corp. v. Palo Tire Serv., Inc., 596 F.2d 604 (3rd Cir., 1979) 4, 5
TMA Fund v. Biever, 520 F.2d 639 (3rd Cir., 1975) 5

Statutes and Rules

Fed. R. App. P.:

Rule 3 3
Rule 3(a) 4
Rule 4(a)(2) 2, 6, 7

Fed. R. Civ. P.:

Rule 54 1
Rule 54(b) ..... *passim*
Rule 58 ..... 2, 6
Rule 79 ..... 2, 6

11 U.S.C. § 362 7
28 U.S.C. § 1292(b) 4

Text

9 MOORE'S FEDERAL PRACTICE, ¶ 204.14 (2d ed.) at 4-116 7

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The statement of the case as set forth by Petitioners is essentially correct. It should be noted, however, that in its letter of June 4, 1982, the Tenth Circuit Court of Appeals specifically advised the parties of the reason it was contemplating summary dismissal of the appeal for lack of jurisdiction. Respondent's Appendix A1. The court cited Rule 54, Fed. R. Civ. P., and questioned whether it lacked jurisdiction to entertain the appeal for the reason that Plaintiff's claims against two of the Defendants did not appear to be resolved. Respondent's Appendix A1. Peti-

tioners' response was to obtain a Rule 54(b) certification from the district court. Petitioners' Appendix A6. Petitioners thereafter failed to file another, or amended, notice of appeal. The Tenth Circuit held that the judgment had become final upon the obtaining of the Rule 54(b) certification and dismissed the appeal because of Petitioners' failure to thereafter file a timely notice of appeal.[1] Petitioners' Appendix A3.

SUMMARY OF ARGUMENT

Petitioners' failure to file a notice of appeal after seeking and obtaining a Rule 54(b) certification, and thereby causing the judgment to become final and appealable, properly resulted in the dismissal of their appeal.

There is not such a conflict among the circuits as would justify this Court's acceptance of jurisdiction. The cases cited by Petitioners are either distinguishable from, or reconcilable with, the decision of the Tenth Circuit in this case.

Whether the district court had jurisdiction to enter a Rule 54(b) certification after the filing of a premature notice of appeal is not an issue at this time.

A judgment under Rules 58 and 79 of Fed. R. Civ. P. was entered on June 17, 1982.

Rule 4(a)(2) Fed. R. App. P. is clearly inapplicable since the notice of appeal was not filed ". . . after the

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1. In their footnote 1, Petitioners correctly note that, at their urging, the district court vacated the original judgment and entered a new judgment from which Petitioners filed a notice of appeal. Petitioners state that "If the Tenth Circuit does reach the merits of the appeal, Petitioners will voluntarily dismiss this petition." Petition, page 4. Respondent filed a motion to dismiss Petitioners' second appeal which was denied on February 4, 1983. Respondent's Appendix A3.

announcement of a decision or order but before the entry of the judgment or order."

Petitioners have cited no authority for the proposition that a stay under the Bankruptcy Act as against the remaining defendants justifies a failure to comply with Rule 54(b) Fed. R. Civ. P. and Rule 3 Fed. R. App. P.

Petitioners' argument that "exceptional circumstances" justify their failure to timely file a notice of appeal is not well taken in view of the clear holding of the Tenth Circuit rendered only a year previously.

ARGUMENT

A. Petitioners' Failure to File a New or Amended Notice of Appeal After the Judgment Became Final Justified Dismissal ot Their Appeal.

The decision of the Tenth Circuit was based on its previous decision of *A. O. Smith Corp. v. Sims Consolidated Ltd.*, 647 F.2d 118 (10th Cir., 1981), decided and published more than one year prior to the entering of the Rule 54(b) certification in this case. In *A. O. Smith,* as in this case, the Tenth Circuit held that a Rule 54(b) certification, obtained from the district court after the filing of a notice of appeal, does not cure an otherwise defective notice of appeal. Instead, the Rule 54(b) certification merges with the order to become a final judgment at the time of the certification. *A. O. Smith Corp. v. Sims Consolidated Ltd., supra,* at p. 120.

In *A. O. Smith,* the appellant (Smith) filed a new notice of appeal after the district court issued its Rule 54(b) certification; a procedure which the Tenth Circuit noted with approval. *A. O. Smith Corp. v. Sims Con-*

solidated Ltd., supra, at p. 121. In this case, however, despite the instruction of the *A. O. Smith* case, the Petitioners failed to file a timely notice of appeal after the judgment became final, thereby depriving the Tenth Circuit of the jurisdiction to hear the appeal. Petitioners' Appendix A3.

Petitioners do not contest the clarity of law of the Tenth Circuit. But, Petitioners contend that this case is in direct conflict with the decisions of the Seventh Circuit in *Local P-171 v. Thompson Farms Co.,* 642 F.2d 1065 (7th Cir., 1981), and *Sutter v. Groen,* 687 F.2d 197 (7th Cir., 1982), and the Third Circuit in *Tilden Financial Corp. v. Palo Tire Serv., Inc.,* 596 F.2d 604 (3rd Cir., 1979).

Local P-171 is, however, distinguishable from this case. In *Local P-171,* the district court never did enter a certification pursuant to Rule 54(b). While the Seventh Circuit held that the appeal was proper, it apparently based its decision, for the most part, on the provisions for interlocutory appeal under 28 U.S.C. § 1292(b). *Local P-171 v. Thompson Farms Co., supra,* at p. 1073. Indeed, the district court had entered such a certification for interlocutory appeal under 28 U.S.C. § 1292(b). *Local P-171 v. Thompson Farms Co., supra,* at p. 1068. The statements of the Seventh Circuit regarding Rule 54(b) are, therefore, dicta. In *Sutter v. Groen, supra,* the Seventh Circuit followed its decision in *Local P-171.*

The Third Circuit in *Tilden Financial Corp. v. Palo Tire Serv., Inc.,* 596 F.2d 604 (3rd Cir., 1979), did indeed sanction a premature appeal from an interlocutory order, which was thereafter certified as final. The Third Circuit recognized the general rule that: "[O]ur jurisdiction attaches on the date when the notice of appeal is filed in the district court from an appealable order. See, Fed. R. App. P. 3(a).

If the jurisdictional prerequisites are not satisfied as of that date, we have no recourse but to dismiss the appeal." citing *TMA Fund v. Biever,* 520 F.2d 639 (3rd Cir., 1975) at p. 642.[2] The Third Circuit in *Tilden* held, however, that the order became a final appealable order upon the entry of the Rule 54(b) certification. In this respect, however, the case is not really different from the holding of the Tenth Circuit in this case that a final appealable order existed at the time the district court entered the Rule 54(b) certification, following the premature notice of appeal.

If, therefore, there is any difference of opinion among the circuits, it is only as to whether a notice of appeal needs to be timely filed after the entry of a Rule 54(b) certification subsequent to a premature notice of appeal. Such a conflict is not such a ". . . real or embarrassing conflict . . ." which should command the attention of this Court. *NLRB v. Pittsburgh Steamship Co.,* 340 U.S. 498 (1951).

B. Whether the District Court Had Jurisdiction to Enter a Rule 54(b) Certification After the Filing of a Premature Notice of Appeal Is Not an Issue at This Time.

Petitioners contend that: "[a] split of authority has apparently developed in the circuits as to the effect on a

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2. The Third Circuit in *Tilden* concluded that: ". . . a premature appeal taken from an order which is not final but which is followed by an order that is final may be regarded as an appeal from the final order in the absence of a showing of prejudice to the other party." *Tilden Financial Corp. v. Palo Tire Serv., Inc., supra,* at p. 607, citing *Richerson v. Jones,* 551 F.2d 918 (3rd Cir., 1977) at p. 922. The Third Circuit applied an identical test in *Griggs v. Provident Consumer Discount Co.,* 680 F.2d 927, 929 (3rd Cir., 1982). But, this Court expressly rejected this view of the requirement of a timely notice of appeal which it described as "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.,* ..... U.S. ....., 74 L. Ed. 2d 225 (1982).

district court's jurisdiction of the filing of a notice of appeal, seeking review of a technically non-appealable order . . ." Petition, p. 7. Petitioners cite many cases for the proposition that "a majority of the courts of appeals" hold "that an appeal taken from a non-final judgment does *not* divest the district court of jurisdiction to take further action with respect to that judgment." Petition, pp. 7-8.

But, Petitioners are attempting to create an issue which, at this time, does not exist. Respondent does not now contend that the district court did not have jurisdiction to enter the Rule 54(b) certification. Indeed, the Tenth Circuit held that the judgment became final upon the obtaining of the Rule 54(b) certification. Petitioners' Appendix A3. It necessarily found, therefore, that the district court had jurisdiction to enter that certification, thereby causing the judgment to become final at that time.

C. Petitioners' Arguments Under Rules 58 and 79 Fed. R. Civ. P., Rule 4(a)(2) Fed. R. App. P., the Bankruptcy Act and the "Exceptional Circumstances" Doctrine Are on the Merits but, in Any Event, Are Not Well Taken.

Petitioners do not state why their remaining arguments justify consideration by this Court. Instead, Petitioners appear to be prematurely arguing the merits of their case. In any event, their arguments are not well taken.

Petitioners argue that the Tenth Circuit's decision ignores the requirements of Rules 58 and 79, Fed. R. Civ. P. since "no 'separate document' meeting the Rule 58 specifications for a judgment effective on that date (June 17, 1982) appears of record." Petition, p. 10. But, this Court's attention is directed to Petitioners' Appendix A6 which sets forth the Order of the district court dated June 17,

1982, entering judgment in favor of Plaintiff and against Defendants. See also *Bankers Trust Company v. Mallis*, 435 U.S. 381 (1978).

Petitioners also contend that the Tenth Circuit ignored the provisions of Rule 4(a)(2) Fed. R. App. P. But, Petitioners completely misread the rule. Rule 4(a)(2) applies only to ". . . a notice of appeal filed after the announcement of a decision or order but *before* the entry of the judgment or order . . ." (emphasis added). In this case, the notice of appeal was filed *after* the entry of the judgment even though it was filed before the entry of a *final* judgment. See also *A. O. Smith Corp. v. Sims Consolidated Ltd.*, 647 F.2d 118, 120 (10th Cir., 1981).[3]

Petitioners contend that the automatic stay provisions of the Bankruptcy Act, 11 U.S.C. § 362, made the Rule 54(b) certification unnecessary. Significantly, Petitioners cite no cases in support of their position but merely suggest that the issues remaining to be decided by the district court "might never be litigated". Petition, p. 13. Petitioners' use of the word "might" indicates that, even at this late date, they are engaging in twenty-twenty hindsight. The fact that the other pending claims were, at that time, stayed is certainly a factor which the district court should have taken into consideration in determining whether to grant the Rule 54(b) certification. But, the fact

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3. See, in this respect, 9 MOORE'S FEDERAL PRACTICE, ¶ 204.14 (2d ed.) at 4-116 wherein it is stated: "It is to be noted, however, that Rule 4(a)(2) relates to a notice of appeal filed 'after the announcement of a decision or order but before the entry of the judgment or order.' It applies, therefore, only to a decision that will be final on its entry. . . It does not make appealable an order that is not appealable under § 1291 or § 1292 (a). . . Nor does it save an appeal that is taken from an order appealable only on a finding under Rule 54(b)."

that the bankruptcy stay was in effect did not, and does not, negate the necessity of obtaining a Rule 54(b) certification. There obviously were remaining issues to be decided by the district court. The petition, itself, states that "Defendant Kimball was granted a bankruptcy discharge. . ." Petition, p. 13. There is no indication in the record as to the disposition of the bankruptcy case filed by Defendant Krogness.

Finally, Petitioners claim that the "exceptional circumstances" doctrine should have been applied to relieve them of the effects of their failure to file a timely notice of appeal. Petitioners contend that they relied on a statement by the district court. But, we suggest it was the responsibility of Petitioners, not the district court, to determine and follow the proper procedure for effecting an appeal. In any event, Petitioners could not justifiably rely on any such statement in view of *A. O. Smith v. Sims Consolidated Ltd.*, 647 F.2d 118 (10th Cir., 1981), which had been published over a year prior to the entry of the Rule 54(b) certification in this case.

CONCLUSION

A petition for certiorari should be granted only when a case involves "principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authorities between the circuit courts of appeal." *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951).

This case involves merely the failure of Petitioners to timely file a new or amended notice of appeal after the judgment from which they were attempting to appeal had become final. As such, it involves no great or momentous principle which needs to be decided by this Court.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

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RE: 82-1553, Stickler v. Arnold Industries, Inc. et al.

Dear Counsel:

This Court has today assigned the captioned case to Calendar C, pursuant to Tenth Circuit Rule 10, as revised on March 12, 1980. The Court is considering summary dismissal of this case for the reason that the Court may lack jurisdiction over it.

Within fifteen (15) days of this date, the parties may simultaneously file with the Clerk memorandum briefs in quadruplicate in support of their respective positions. The memoranda should contain proof of service showing the names and addresses of persons or entities served, and may contain citations to relevant legal authorities. *These*

memoranda should specifically address the question set forth at the bottom of this page.

Any party may include in his memorandum a statement setting forth reasons why, in his opinion, oral argument should be heard. The memoranda and the trial court record will be reviewed by a panel of three judges. If the three judges unanimously determine that oral argument is not needed, the case will be submitted for determination without oral argument. No further briefs should be filed until further notice from the Court.

Sincerely yours,

HOWARD K. PHILLIPS, Clerk
By /s/ MIGUEL J. CORTEZ, JR.
Miguel J. Cortez, Jr., Appeals Expediter

QUESTION TO BE ADDRESSED:

Does this Court lack jurisdiction to entertain this appeal for the reason that plaintiff's claims against defendants David Kimball and Larry Krogness do not appear to have been resolved when defendant's notice of appeal was filed?

See Fed.R.Civ.P. 54(b); Golden Villa Spa, Inc. v. Health Industries, Inc., 549 F.2d 1363 (10th Cir., 1977), order of the District Court of December 23, 1982.

cc: Barry F. Savage, Savage & Lindsley Co., 228 North Erie Street, Toledo, OH 43624

James R. Manspeaker, Clerk, Room C-145, U.S. Courthouse, Denver, CO 80294 (D.Ct. # 80-Z-419)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
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February 4, 1983

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Re: No. 83-1052; Stickler vs. Arnold Industries
82-2551; Stickler vs. Arnold Industries

Dear Counselors:

The Court has today entered an order, in the captioned appeal, on the docket as follows:

"2/4/83 Order: Appellee's motion to dismiss denied —Chief Judge Seth. (parties served by mail)"

Sincerely yours,

HOWARD K. PHILLIPS, Clerk
By /s/ ROBERT L. HOECKER
Robert L. Hoecker
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RLH:kmh

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